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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RON NORTON,

Plaintiff and Appellant,

v.

COLLECTRONICS, INC. et al.,

Defendants and Respondents.

A102715

(San Francisco County
Super. Ct. No. 319513)

Appellant Ron Norton was sued by a collection agency for a \$1,200 debt he incurred to a third party. Norton asserted that the debt had been paid off in full at the outset of the litigation, and eventually prevailed. He thereafter sued the agency and its principal officer, as well as two related agencies and their attorneys, alleging malicious prosecution and other tort claims. He appeals from a summary judgment in favor of four of the defendants, contending that the trial court erred in: (1) finding no triable issues of fact as to the involvement of these defendants in the alleged malicious prosecution of the collection action; and (2) sustaining demurrers to his other causes of action. We affirm the trial court's demurrer rulings, but reverse the judgment dismissing Norton's malicious prosecution claim against respondents.

BACKGROUND

Norton closed his restaurant (named Carbos) owing money to Rycoff-Sexton, Inc. (RS) and Allied-Sysco Food Services, Inc. (ASFS). RS assigned Norton's balance due to Collectronics, Inc., doing business as Great Western Collection Bureau. Under a contract

originally executed in 1993, and still in effect as of 1999, ASFS assigned some of its accounts receivable to Collectronics for collection. The contract authorized Collectronics to commence suits “in its own name or in the name of its designee” to collect amounts owed to ASFS. At all relevant times, Gary Looney was the president and chief operating officer of Molalla Holdings, Inc., Creditors Trade Association, Inc. (CTA), and Collectronics.

San Mateo Action

In November 1997, Molalla filed a collection action in San Mateo County against Norton on the RS debt, seeking to collect the principal amount of \$2,540.60. The attorney for Molalla in the San Mateo action was Stephen Becker, and the complaint was verified by Looney. On February 4, 1998, Molalla obtained an uncontested default judgment in the San Mateo action for \$3,318.91, which included interest, attorney fees, and costs.

Following entry of judgment in the San Mateo action, Norton received a letter from attorney Anthony Head, who was not the attorney of record in that action, demanding payment of the judgment. Head’s letter listed the title of the San Mateo action as “Collectronics, Inc. vs. Carbos et al,” and it instructed Norton to pay the judgment amount to Head’s client, Collectronics. Norton spoke with Looney who agreed that as long as Norton made payments of \$400 per month, Molalla would forgo executing on the judgment.

Norton made weekly payments of \$100 to Collectronics on the San Mateo judgment until August 1998, when he received notice that Molalla had levied against his bank account. In accordance with the instructions prepared by Molalla, the amount of the levy was the judgment amount, plus postjudgment interest and levying fees, less a credit of \$825.97 for Norton’s installment payments. However, Norton had actually made payments totaling \$1,400 on the San Mateo judgment. Accordingly, Molalla received \$574.03 more from its bank levy than Norton still owed on the San Mateo judgment. Although Norton requested Molalla to return these funds to him, Molalla did not do so.

Alameda Action

In January 1999, Head wrote to Norton demanding payment of Norton's debt to ASFS in the amount of \$1,219.35.¹ Head's letter stated that unless payment of the alleged debt to ASFS was sent immediately to Collectronics, "Collectronics, Inc. intends to instruct this law office to proceed with legal action against you." Molalla subsequently filed a collection action in Alameda County against Norton on the ASFS debt. Collectronics paid the filing fee for the Alameda complaint. Looney signed the check. The complaint was filed on January 21, 1999, in the name of Molalla and alleged that ASFS had assigned the account to Molalla for collection. Head billed his fees in the case to Collectronics, not Molalla.

Norton answered Molalla's complaint in the Alameda action in pro. per. In his answer, he asserted that he was entitled to a credit of \$574.03 for the overpayment to Molalla in the San Mateo action. He also enclosed a cashier's check to Collectronics for \$875.97, representing the principal amount of the ASFS debt, plus accrued interest of \$230.65, less the claimed credit of \$574.03. Throughout the Alameda litigation, Molalla denied receipt of the cashier's check and denied Norton's right to a credit of any amount based on the bank levy made on the San Mateo judgment.

The trial court in the Alameda action initially agreed with Molalla that Norton was not entitled to any credits against his debt to ASFS. The court granted Molalla's summary judgment motion and awarded Molalla a judgment for \$1,219.35 plus interest and attorney fees. It rejected Norton's argument that he was entitled to a credit for the San Mateo overcollection, and rejected his evidence of the \$875.97 payment to Collectronics at the outset of the Alameda suit. After judgment was entered, Head submitted a motion for attorney fees of \$5,500. The moving papers included an itemized bill for professional services from Head to Collectronics which showed that Head had in

¹ Respondents produced a copy of the letter in discovery. Norton denies receiving it.

fact received Norton's cashier's check for \$875.97. Based on this new evidence that he was entitled to a credit, Norton filed a motion for a new trial on January 12, 2000.

A few days after filing and serving the motion, Norton received a letter from Head demanding payment of \$997.75 for postjudgment attorney fees allegedly incurred by Molalla *in the San Mateo action*. This was nearly 18 months after the San Mateo judgment had been paid in full. Although Head had not been Molalla's attorney of record in the San Mateo action, he and Becker shared the same mailing address and telephone number at that time.² Becker subsequently filed the fee motion in San Mateo, but later withdrew it.

Based on Norton's new trial motion, the trial court in the Alameda lawsuit found that Norton was in fact entitled to a credit of \$875.97 against the debt Molalla was claiming. It ordered that Norton be granted a new trial unless Molalla accepted a reduced judgment of \$343.38 plus an additional \$343.38 in attorney fees. Following entry of this reduced judgment, Norton received a letter from Head demanding payment to CTA of \$1,289.71, which the letter represented to be the amount of the judgment. The letter's subject line was "Re: Creditors Trade Association, Inc. vs. Carbos et al." It referenced the same internal file and account numbers that had been used in all of Head's correspondence to Norton about the ASFS debt. The letter threatened further enforcement actions unless payment was made, and requested that Norton remit payment to CTA. Head followed up with postjudgment discovery requests and attempts to levy on Norton's bank accounts.

Norton paid respondents \$686.76 under protest, but also appealed the judgment to the superior court appellate department on the ground that it failed to reflect an offset for Molalla's overcollection of \$574.03 in the San Mateo action. The appellate panel ultimately agreed with Norton, and ordered entry of a judgment in his favor for attorney fees and costs incurred by him in defending the Alameda suit.

² Collectronics's invoice for the filing fees paid in the Alameda action listed Head and Becker's post office box as its mailing address.

Present Action

This action was originally filed on March 9, 2001. Norton asserted causes of action for malicious prosecution and abuse of process, later amending his complaint to include additional causes of action for fraud, negligent misrepresentation, and conspiracy. The defendants were Molalla, Collectronics, CTA, Looney, Becker, and Head.

The trial court eventually sustained demurrers, without leave to amend, to all of Norton's causes of action except his malicious prosecution claim based on defendants' prosecution of the Alameda lawsuit. The court thereafter granted summary judgment in favor of all of the defendants except Molalla and Head on the malicious prosecution claim, ruling as a matter of law that the other defendants were not involved in or liable for prosecution of the Alameda action.³ Norton timely appealed from the ensuing judgment in favor of respondents.

DISCUSSION

Demurrer Rulings

Norton contends that his fraud, abuse of process, and extrinsic fraud causes of action should be reinstated. He argues at length that these theories are viable because neither RS nor ASFS ever assigned their debts to Molalla and, therefore, Molalla had no legal right to pursue either of the collection lawsuits it brought against him. Norton further contends that the defendants' refusal to credit him for the funds overcollected in the San Mateo action, until required to do so in the Alameda action, constituted a continuing abuse of process for which he was also entitled to relief.

³ The trial court found triable issues of fact as to whether the initiation and prosecution of the Alameda lawsuit constituted malicious prosecution. This ruling is not challenged on appeal. We therefore assume for purposes of our analysis, without in any way deciding the issue, that Norton will be able to prove the Alameda suit was maliciously prosecuted against him. In particular, the determination of whether defendants sued Norton without probable cause falls outside the scope of this appeal.

Norton's fraud claims were properly dismissed based on the absolute privilege for statements made in a legal proceeding, found in Civil Code section 47, subdivision (b).⁴ "The absolute privilege of Civil Code section 47, subdivision (b) applies to all torts other than malicious prosecution, including fraud, negligence and negligent misrepresentation." (*Harris v. King* (1998) 60 Cal.App.4th 1185, 1188.) The privilege attaches to " . . . any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 23–24.) Thus, defendants' representations in the course of litigating the San Mateo and Alameda actions, that Molalla was an assignee of Norton's RS and ASFS debts, is not actionable on a fraud or misrepresentation theory.⁵

Norton's extrinsic fraud theory also fails. " . . . When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud." [Citation.] Generally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud. [Citation]." (*Home Ins. Co. v. Zurich Ins. Co.*, *supra*, 96 Cal.App.4th at p. 27, quoting *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051 at p. 1069.) Norton's fraud claim involves intrinsic fraud only. Whether Molalla had standing to sue him was an issue Norton could have pursued in the collection actions. He was free to conduct discovery concerning and

⁴ Civil Code section 47, subdivision (b), includes as "[a] privileged publication or broadcast" one made "[i]n any . . . judicial proceeding." Although initially enacted with reference to defamation actions, the privilege has been construed expansively to encompass any communication in a protected setting, whether or not it is a publication. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29.)

⁵ We do not reach the issue of whether Molalla had standing to sue Norton on these debts or whether suing on an otherwise valid debt in the name of a designee without standing would be actionable as malicious prosecution.

dispute any of the allegations in Molalla's complaints, including the allegation that Molalla was a valid assignee of Norton's creditors.

The litigation privilege applies to abuse of process claims. (*Drasin v. Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485 [filing of a complaint in an attempt to coerce a settlement is protected by privilege and is not an abuse of process].) As long as the communication complained of was made to achieve the objects of the legal proceedings and is not "palpably irrelevant" to them, it cannot support an abuse of process claim. (*Loomis v. Superior Court* (1987) 195 Cal.App.3d 1026, 1030.) Whether the publication is false or perjurious is not the determining factor in applying Civil Code section 47. (*Rosenthal v. Irell & Manella* (1982) 135 Cal.App.3d 121, 127.) Thus, the trial court properly dismissed Norton's abuse of process claims to the extent they were based on Molalla's allegedly false or fraudulent assertion of standing to sue.

Norton offers no authority and no argument for his alternative theory that Molalla's seizure of excess proceeds from its bank levy in the San Mateo action, and its refusal to return or credit those funds against his debt to ASF, were an abuse of process. Points offered without argument or legal support are waived. (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

In any event, Norton's abuse of process claim fails on the merits. Abuse of process is subject to a one-year statute of limitations. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 886–887.) The limitations period begins to run when the injury occurs. (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1467.) Norton incurred injury when Molalla levied on his account in August 1998 or, at the very latest, when it proceeded with the Alameda lawsuit in early 1999 without giving him an offset for the excess amount levied. This action was not filed until March 2001, more than two years after these events. The claim is therefore barred by the statute of limitations. (See *Carman v. Alvord* (1982) 31 Cal.3d 318, 324 [appellate court may affirm a judgment of dismissal after a demurrer has been sustained without leave to amend on any ground raised in the demurrer].)

The trial court properly dismissed Norton’s causes of action for fraud, abuse of process, and extrinsic fraud.

Malicious Prosecution

The trial court found no triable issues of material fact as to whether respondents Collectronics, CTA, Gary Looney, and Stephen Becker could be held liable for malicious prosecution in connection with Molalla’s Alameda lawsuit. We reverse the judgment as to these defendants on the grounds stated below.

A person injured by groundless litigation may seek compensation from any person who procures or is actively instrumental in putting the litigation in motion or participates after the institution of the action. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, fn. 11.) Persons who procure a third person to file suit (*Siffert v. McDowell* (1951) 103 Cal.App.2d 373, 378–379), or who initiate an action without personally signing the complaint (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371–1373), may be held liable for malicious prosecution. One who aids and abets another in commencing or continuing a groundless lawsuit, with knowledge of its malicious intent, is equally liable, even though not nominally a party to the original proceeding. (*Peebler v. Danziger* (1951) 104 Cal.App.2d 614, 619–620.) Multiple defendants may be held liable for malicious prosecution on a theory of civil conspiracy. (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 897.)

Thus, the undisputed fact that Molalla was the only named plaintiff in the Alameda collection action does not, standing alone, rule out potential liability on the part of other parties. To begin with, there is extensive evidence in the record that Collectronics, not Molalla, was the moving force behind the Alameda suit. The only written instrument produced in the litigation that authorized a third party to bring a collection suit on Norton’s account with ASFS was ASFS’s collection contract with Collectronics. That contract contained the following authorization to bring suit: “[ASFS] hereby grants [Collectronics] continuing authority to commence suit . . . in its name or in the name of its designee, to collect Assigned Accounts.” In other words, the contract authorized *Collectronics* to bring suit, either by commencing the suit itself or by

designating another entity to act for it. In either case, the contract language contemplates that Collectronics would put the litigation in motion. Nothing in the contract suggests any authorization by ASFS for Molalla to sue without direction from Collectronics, and respondents have produced no evidence of any such authorization emanating from another source.

Further evidence of Collectronics's involvement in the litigation includes the following: (1) By respondents' own account, Head wrote to Norton just before he filed the Alameda suit, warning that unless Norton promptly paid Collectronics the amount he owed to ASFS, Collectronics "intends to instruct this law office to proceed with legal action against you"; (2) Collectronics paid the filing for the Alameda lawsuit; (3) Collectronics cashed the cashier's check that Norton sent along with his answer to the Alameda complaint.

There is thus sufficient evidence in the record to create a triable issue of fact as to Collectronics's liability for malicious prosecution.

Respondents' motion for summary judgment as to Gary Looney was based on Looney's averment that he acted "solely in [his] capacity as an employee and officer of . . . Molalla . . . , Collectronics [or CTA]" throughout the events alleged in the complaint. However, there was no evidence that the prosecution of the Alameda collection action resulted from corporate decisions that Looney merely carried out as an employee. To the contrary, it was undisputed that Looney was: (1) the president and chief operating officer of all three entities; (2) the person who employed Head to file the Alameda lawsuit against Norton; and (3) the person who signed Collectronics's check to pay the filing fees for the Alameda lawsuit even though the suit was brought in the name of Molalla, an ostensibly separate entity. In the absence of any evidence that Looney took orders from another person or entity, it is reasonable to infer that he in fact controlled all three corporate entities and made or participated in all relevant decisions regarding the Norton litigation. He was also a central witness in the Alameda case. According to Norton's declaration in opposition to summary judgment, Looney falsely testified under oath in the

Alameda action that Norton had not paid any portion of the ASFS debt at the outset of the suit.

“Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct.” (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785.) The president of a corporation is an officer and corporate officers are liable for their tortious acts committed on behalf of the corporation. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 48 [reversing summary judgment in favor of corporate president based on asserted fact that he acted solely on behalf of corporation].) In this case, there is sufficient evidence that Looney directly authorized and participated in allegedly tortious activity to create a triable issue of fact as to his liability.

Less evidence connects CTA and Becker to the prosecution of the Alameda action but, resolving all doubts in favor of the party opposing summary judgment (*Thunderburk v. United Food & Commercial Workers’ Union* (2001) 92 Cal.App.4th 1332, 1337), we find that there are triable issues of material fact as to these respondents as well.

After the trial court forced Molalla to accept a remittitur of \$875.97, Head wrote to Norton *on behalf of CTA*, demanding payment of the judgment. The letter represented that the amount due on the judgment was \$1,289.71, which was nearly twice the actual judgment amount, including attorney fees. It threatened Norton with further enforcement actions, including attachment of property and garnishment of wages and accounts, unless payment was made within 10 days by cashier’s check payable *to CTA*. As the superior court appellate panel later determined, even the reduced judgment was unsound, and Norton in fact owed nothing. CTA’s attempt to collect, and possibly overcollect, on this judgment is sufficient to create a triable issue of fact as to CTA’s potential liability for malicious prosecution in the Alameda action. Further, it would be unreasonable to allow Collectronics, Molalla, or CTA to avoid liability based on their fictional separateness when it is clear that all three entities were controlled by the same person and were

deployed interchangeably to bring coercive pressure on Norton in connection with the Alameda proceedings.

Becker apparently made no appearance in the Alameda case. However, Becker and Head operated from the same mailing address and shared the same telephone number during the time the San Mateo and Alameda actions were being prosecuted. There was evidence that the two attorneys worked in concert on collection matters for Collectronics. Immediately after Norton came forward in the Alameda action with new evidence that Collectronics had in fact received his cashier's check for \$875.97, Head wrote to Norton demanding payment of a roughly offsetting amount of attorney fees allegedly incurred by Molalla in the San Mateo action. Head had never appeared in the San Mateo case. Until Head's letter, that case had been moribund and ostensibly closed for nearly 18 months with the judgment fully satisfied. That letter was promptly followed up *by Becker*, with the filing of a motion for fees in the San Mateo case. The alleged fees were itemized in an invoice on Head's letterhead, not Becker's. In an accompanying declaration, Becker represented that the invoice was "my firm's bill for the services rendered" but did not specify who had performed the services. The suspicious timing of the demand for attorney fees in the San Mateo action, and the documentary evidence suggesting that Becker and Head worked in tandem on collection matters for Collectronics as de facto members of the same law firm, creates a triable issue of material fact as to whether Becker acted in concert with Head and the other defendants to create an offset against the \$875.97 credit to which Norton was otherwise entitled in the Alameda action.

Accordingly, the trial court erred in granting summary judgment to respondents Collectronics, CTA, Looney, and Becker on Norton's malicious prosecution claim.

DISPOSITION

The judgment in favor of respondents is reversed and the case remanded for further proceedings, consistent with the views expressed herein, on appellant's cause of action for malicious prosecution.

Margulies, J.

We concur:

Marchiano, P.J.

Stein, J.